



Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I am a business lawyer negotiating with an opponent over the price to acquire a non-public company. May I state that the business is only worth \$10 per share, although I have an expert evaluation opinion at \$15 per share? May I also state that \$12 per share is "all I will offer" if my client in fact has given me authority to go up to \$15 per share?

A: These questions of negotiation ethics implicate Model Rule 4.1(a), which prohibits a lawyer from making a "false statement of material fact" to a third person. Comment 2 to Rule 4.1 states that "[u]nder generally accepted conventions in negotiation, certain types of statements are ordinarily not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category...." This implies an expectation by all concerned in negotiations that no reliance should be placed on these types of statements, i.e., that it is not truth being sought in negotiations over price, but a deal. But be careful not to extend this too far. For example, query whether stating to a mediator that you only have authority to offer a certain amount when your client has specifically given you greater authority than that has gone beyond a statement of intention to a false statement of fact.

It is prudent either to not obtain greater authority until needed, or to speak only in terms of what you are willing or intend to offer rather than the amount for which you have authority. In addition, do not rely on these conventions to extend to other non-price-related terms in a negotiation. See, e.g., *In re Rosen*, 198 P.3d 116 (Colo. 2008) (lawyer's statement leading insurance co. to believe deceased client was still alive until after settlement violated Rule 4.1). In addition, be aware of other applicable law that may apply to your communications in a particular context, e.g., applicable state law concerning misrepresentation, state or federal securities laws.

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About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American

College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.